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421325—41——1

# In the Supreme Court of the United States

OCTOBER TERM, 1941

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Nos. 40 and 41

CHRYSLER CORPORATION, DE SOTO MOTOR CORPORATION, PLYMOUTH MOTOR CORPORATION, APPELLANTS

*v.*

THE UNITED STATES OF AMERICA

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COMMERCIAL CREDIT COMPANY, COMMERCIAL CREDIT CORPORATION, ET AL., APPELLANTS

*v.*

THE UNITED STATES OF AMERICA

---

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The district court did not render any opinion.

### JURISDICTION

The decree of the district court was entered on December 21, 1940 (R. 117). Petitions for appeal

were filed on February 14, 1941, and were allowed in No. 40 on the same day and in No. 41 on February 17, 1941 (R. 118, 121, 125, 127).

The jurisdiction of this Court is conferred by section 2 of the Act of February 11, 1903, 32 Stat. 823, 52 U. S. C., section 29, and section 238 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 931, 936, 28 U. S. C., sec. 345.

## QUESTIONS PRESENTED

1. Whether the facts before the district court warranted its order modifying the consent decree.

2. Whether there were any disputed, relevant factual issues before the district court which required it to hear testimony before acting upon the Government's motion for modification of the consent decree.

3. Whether the pleadings are fatally defective because the Government's application for modification of the decree was in the form of a motion.

4. A question not directly presented by appellants which this Court may wish to consider is whether the case should be remanded to the district court because of its failure to make findings or to state its conclusions of law.

## STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, provides in part as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor * * * (15 U. S. C., Supp V, sec. 1).

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * * (15 U. S. C., sec. 2).

* * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

## STATEMENT

These are separate appeals by Chrysler Corporation and certain of its subsidiaries (No. 40) and by Commercial Credit Company and certain of its

subsidiaries (No. 41) from an order of the district court modifying a decree entered against appellants with their consent on November 15, 1938, in an equity proceeding brought against them by the United States charging violations of the Sherman Act.

*The modification in the decree requested by the Government.*—The decree, in addition to numerous other prohibitions, provides that Chrysler Corporation (referred to herein as Chrysler) "shall not make any loan to or purchase the securities of" any finance company [1] (R. 46). Following this prohibition (¶12, first paragraph), the decree provides that if an effective final decree shall not have been entered by January 1, 1941, requiring General Motors Corporation to divest itself of all ownership and control of General Motors Acceptance Corporation, its subsidiary finance company, the decree shall not preclude Chrysler from acquiring control over or an interest in any finance company. This provision (¶12, second paragraph) reads (R. 46–47):

> It is an express condition of this decree that notwithstanding the provisions of the preceding paragraph of this paragraph 12 and of any other provisions of this decree, if an effective final order or decree not subject to further review shall not have been en-

[1] The decree defines "finance company" to mean a company engaged in financing the purchase of automobiles either by dealers or by retail purchasers (R. 31).

> tered on or before January 1, 1941, requiring General Motors Corporation permanently to divest itself of all ownership and control of General Motors Acceptance Corporation and of all interest therein, then and in that event, nothing in this decree shall preclude the Manufacturer [Chrysler] from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with the dealers in the manner provided in this decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a.

On December 17, 1940, the Government filed a motion verified by affidavit requesting that the consent decree be modified by changing the date in the second paragraph of ¶12 from January 1, 1941, to January 1, 1942 (R. 54). The present appeals are from the order of the court making this change in the decree.

Authorization for the Government's motion is to be found in ¶14 of the decree, which provides that the court retains jurisdiction of the cause "for the purpose of enabling any of the parties to this decree to make application to the court at any time * * * for the modification" of the decree (R. 50).

The issues presented to this Court must be considered in the light of the objective of the provision of the decree which the Government sought to have changed. Determination of this objective

requires consideration of certain related proceedings in the court below against appellants and others, the charges made in the bill of complaint filed against appellants, and the general scope and structure of the decree entered against them.

*Related Judicial Proceedings in the Court Below.*—Three indictments were returned in the court below on May 27, 1938, one against appellants, one against Ford Motor Company and certain finance companies affiliated with it, and the third against General Motors and General Motors Acceptance Corporation (referred to herein as GMAC).[2] Each charged a conspiracy to restrain interstate commerce in automobiles produced by the defendant manufacturer by excluding as far as possible all finance companies other than its affiliate from the business of financing such interstate commerce.[3] Each also charged that the manufacturer had, as a part of such conspiracy, given special services, facilities, and preferences to its

[2] Since a court may take judicial notice of its own records (*United States* v. *California Cooperative Canneries*, 279 U. S. 553, 555; *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 38), the above proceedings were within the judicial notice of the district court.

[3] The indictment against appellants charged affiliation between Chrysler and Commercial Credit and a like charge is made in the bill of complaint on which the consent decree rests (R. 6). Chrysler, as a result of the negotiations leading to entry of the consent decree, severed this affiliation prior to entry of the decree by disposing of its stock interest in Commercial Credit and by canceling a preferential contract with it (R. 19–20, 88–89).

affiliated finance company and had coerced its dealers to use the services of the affiliate.

After the Chrysler and the Ford defendants had agreed to the entry of decrees satisfactory to the Government, it filed a bill in equity against appellants on November 7, 1938 (R. 1). On the same day appellants filed their answers and a form of consent decree was presented which, after a hearing, was entered on November 15, 1938 (R. 15, 24, 29–30, 109).[4]

*Charges in the Bill Filed Against Appellants.*— The bill filed against appellants charges that General Motors, Chrysler, and Ford produce about 90% of all the automobiles manufactured in this country, that each markets its cars in the same manner, that financing is essential to such marketing, and that each has engaged in a parallel, though separate, conspiracy with its affiliated finance company to exclude other finance companies from the business of financing its cars in interstate commerce (R. 4–8). The bill alleges, among other things:

Each of these three manufacturers sells its cars to dealers, and through them to the general public, and requires cash payment, prior to delivery, for all cars sold (R. 5–6). The great majority of the dealers must resort to finance companies to obtain

[4] Substantially the same bill was filed, and the same decree was entered, against the Ford group of defendants, on the same respective dates.

the funds required for these advance cash payments and finance companies likewise supply the funds for retail purchasers when they buy, as they usually do, partly on credit (R. 6–7). During the last three years such financing has amounted to about $5,500,000,000 in the case of dealer purchases and to about $6,000,000,000 in the case of retail purchases (R. 7–8). Although there are some 375 independent finance companies, the finance affiliates of the Big Three have obtained over 80% of the business of financing both dealer and retail purchases (*ibid.*).

The bill also charges that, for the purpose of effecting the conspiracy in which appellants were engaged, Chrysler had used various specified means of coercion to compel its dealers to use the services of Commercial Credit and had granted that concern favors and privileges denied to other finance companies (R. 8–12).

*The Scope and Structure of the Consent Decree.*—The prohibitions of the decree directed against Chrysler are found in paragraphs 6 and 12. Paragraph 12, as previously stated (*supra,* p. 4), bars it from acquiring any interest in a finance company. Paragraph 6 contains detailed prohibitions against coercing dealers to use the services of any particular finance company and against itself granting special favors to any such company (R. 32–35, 43). The paragraph provides, however, that Chrysler may grant certain advan-

tages to any "registered finance company" (R. 33–34, 41–42). Subparagraph (j) authorizes any finance company to become "registered" by filing with the court in the equity proceeding against appellants a statement that it will conform to the detailed rules for conducting its business set forth therein (R. 35–40).

Paragraph 7 imposes certain inhibitions upon Commercial Credit which are correlative to some of those imposed upon Chrysler (R. 43–44).

A striking feature of the decree is that, while all the foregoing prohibitions are presently effective, their ultimately binding effect is made dependent upon the outcome of the Government's proceedings against General Motors. The decree provides (¶12a (1)) that if the criminal proceeding instituted against General Motors and GMAC on May 27, 1938, does not terminate in their conviction, "every" provision of the decree shall be forthwith suspended until such time as substantially identical requirements shall be imposed by decree upon General Motors and GMAC (R. 47). The decree also provides (¶12a (2), (3)) that following such conviction, or following entry of a decree against General Motors not subject to further review, or on January 1, 1940, whichever is earliest, appellants are entitled to obtain a suspension of every requirement of paragraphs 6 and 7 to the extent that it is not then imposed by

decree upon General Motors or GMAC (R. 47–49).[5] For the purposes of this provision any agreement, act, or practice which the trial court in the criminal proceeding has held, in its instructions to the jury, to constitute a proper basis for a verdict of guilty shall, after such a verdict, be deemed "the equivalent of a decree" (R. 47–48).

Thus the decree not only provides that *all* of its prohibitions are to be suspended if General Motors and GMAC are not convicted in the criminal proceeding, but it gives appellants certain additional rights both as to the prohibitions of paragraphs 6 and 7 and as to the prohibition against affiliation in paragraph 12 (*supra*, p. 4) unless proceedings by the Government against General Motors are successfully concluded by specified dates.

*Motion for Modification and Proceedings thereon.*—The Government in its motion to have the date in ¶ 12, relating to the termination of the civil proceedings brought against General Motors, changed from January 1, 1941, to January 1, 1942,[6] set forth that numerous preliminary and inter-

[5] As to subparagraphs (a), (b), (c), and (g) of ¶6 and subparagraph (b) of ¶7, the right to obtain such suspension is qualified by the further requirement that appellants show to the satisfaction of the court that General Motors (or GMAC) is performing some agreement, act, or practice prohibited thereunder (R. 48–49).

[6] The Ford defendants had previously consented to this change in the consent decree entered against them (R. 67–68).

locutory proceedings had caused unexpected delay in trial of the criminal proceeding against General Motors; that judgments of conviction of General Motors and GMAC had been entered in November 1939 and that an appeal therefrom was pending;[7] that final disposition of this appeal will shorten and simplify trial of the civil proceeding to compel General Motors to divest itself of its GMAC stock and will avoid unnecessary expense and a needless retrial of the same issues in that proceeding; that on October 4, 1940, the United States had instituted a suit against General Motors to compel divestment of its GMAC stock, and will diligently prosecute this proceeding but that it cannot be terminated by January 1, 1941 (R. 55–58).

Chrysler filed an answer denying certain allegations of the Government's motion and praying that, in the alternative, (1) the motion be forthwith dismissed; (2) the United States be required to elect whether it relies upon "mistake" or upon "changed basic conditions"; or (3) the motion be set down for hearing for the taking of proof (R. 59–61).

The district court, after hearing counsel for both parties, concluded that the relief which the Government sought should be granted.

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[7] The Circuit Court of Appeals affirmed these convictions on May 1, 1941, *United States* v. *General Motors Corp.*, 121 F. (2d) 376 (C. C. A. 7). A petition for certiorari to review this decision is now pending before this Court (No. 352, this Term).

## SUMMARY OF ARGUMENT

I. The consent decree is framed upon the basis that the ultimate rights of the parties thereunder shall be determined by the outcome of the Government's criminal and civil antitrust proceedings against General Motors. To safeguard appellants against undue delay in such litigation, the decree provided for suspension of its prohibitions if convictions were not obtained in the criminal case by January 1, 1940, and for lapse of the bar against affiliation if the civil proceeding were not successfully concluded by January 1, 1941. The district court was warranted in concluding that the primary purpose of the affiliation provisions was to have the bar against affiliation abide the outcome of the civil proceeding against General Motors and that the court should give effect to this purpose by preventing it from lapsing prior to determination of such proceeding. The fact that termination of this bar would seriously impair the effective operation of the other prohibitions of the decree was a further supporting consideration. Appellants, on their part, neither showed nor offered to show that they would be injured by continuance of this bar.

II. The facts bearing upon the question whether the Government had or had not been unduly dilatory in prosecuting the General Motors litigation were not in dispute and they were also within the district court's judicial notice. Insofar as

the motion for modification raised a question as to the primary purpose of the affiliation provisions of the decree, this question was to be determined by the court from the four corners of the decree, read in the light of the allegations of the bill of complaint upon which the decree rested. Accordingly, to have set the case down for the taking of evidence would have been an empty formality and the failure to do so does not constitute an abuse of discretion warranting reversal.

III. The application for modification of the decree was properly made by motion. The only substantive difference between proceeding by motion and proceeding by supplemental complaint is that in the latter proceeding permission for filing must be obtained from the court. But since the consent decree expressly authorized any party to apply at any time for modification, permission for filing was not required whether the application for modification was designated a motion or a supplemental complaint.

## ARGUMENT

### I

### THE FACTS BEFORE THE DISTRICT COURT WARRANTED ITS ORDER MODIFYING THE CONSENT DECREE

The Government concedes that any party requesting modification of a consent decree entered in a proceeding under the Sherman Act must affirmatively show grounds for making the requested

change, but it contends that the extent and character of the showing required depend upon the nature of the change which is sought and all the other relevant circumstances in the particular case. If, as in *United States* v. *Swift & Co.*, 286 U. S. 106, the modification which is requested is that one of the major prohibitions imposed by the decree shall be eliminated, relief will be denied unless it is shown that conditions have so changed since the entry of the decree that there is no longer any reasonable danger of abuses of the kind which the prohibition was designed to prevent. The Court in the *Swift* case, in holding that there had been an insufficient showing to warrant a requested change of this type, said (p. 119):

> The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow.

In like manner, if the Government sought a change in a consent decree which would extend its prohibitions to practices not covered by the original decree or which would radically alter the structure of the decree, the showing required

would approximate that necessary in order to obtain a decree in a litigated proceeding under the Sherman Act.

The change in the decree which the Government sought in the present case was wholly different in character. The decree prohibits Chrysler from acquiring an interest in a finance company but it also provides that Chrysler shall not be bound by this prohibition after January 1, 1941, unless by that date the Government shall have brought to a successful conclusion proceedings to end the existing affiliation between General Motors and GMAC. The change sought by the Government was to have the status of nonaffiliation continued to January 1, 1942, so as to prevent lapse of this prohibition prior to termination of its stock-divestment proceeding against General Motors.

Our previous statement of the provisions of the decree (*supra*, pp. 9–10) shows that it is framed, in general, upon the basis that the Government's proceedings against General Motors are to be the measure and test of the ultimate rights of the parties under the decree. The consent decree was entered without submitting the issues raised by the proceeding against appellants to the test of litigation. The decree provides, in substance, that the litigation against General Motors shall be substituted for such test and that the prohibitions of the decree shall be later adjusted to accord with

the adjudications made and the results achieved in the proceedings against General Motors.

In a decree framed upon this basis appellants were entitled to protection against undue delay in the prosecution of the proceedings against General Motors. Such protection might have been given by providing for suspension or termination of the prohibitions upon a showing of unreasonable delay by the Government in its prosecution of these proceedings (see R. 111). Another method of affording such protection, and the one actually adopted, was to set up a sort of timetable for the proceedings against General Motors. In the case of the prohibitions against coercive and discriminatory practices, the date set was January 1, 1940. If by that date General Motors had not been convicted in the criminal proceeding or a decree not subject to further review had not been entered against it, these prohibitions were to be suspended (*supra,* pp. 9–10). In the case of the prohibition against affiliation, the date set was January 1, 1941. If by that date a decree not subject to further review had not been entered ending General Motors' affiliation with GMAC, the prohibition was to be no longer operative. The Government kept within this timetable in its criminal proceeding against General Motors. It did not in its civil proceeding.

One objective of the provisions of the decree relating to affiliation was to have the right of the

Government to this kind of relief determined by the outcome of its litigation against General Motors. Another objective was to have this litigation completed by January 1, 1941. When the Government filed its motion for modification one or the other of these objectives would necessarily be defeated. We submit that the court below was warranted in concluding that the essential purposes of the decree as a whole would be better served by granting the motion and defeating the latter objective than by denying the motion and defeating the former objective.

The court, in passing upon the motion for modification, was also warranted in giving consideration to the question whether termination of the bar against affiliation would seriously impair the effective operation of the other prohibitions of the decree. Upon the conviction of General Motors and GMAC which occurred after entry of the decree and prior to the motion for modification, this question assumed particular importance because, by virtue of the convictions, it became established that appellants would continue to be bound by the prohibitions of the decree other than that against affiliation.[8]

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[8] While this would not be so if the convictions were reversed on appeal, the court below necessarily had to assume the validity of the judgment then outstanding in the same court.

It is also true that there are, under the decree, certain other possible avenues of escape open to appellants but they

A unique feature of the decree is that it provides for an elaborate registration system for finance companies. A company, upon registering, assumes certain obligations designed to safeguard retail automobile purchasers against oppressive or extortionate financing practices.[9] In return

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are too limited or conjectural to be of any real significance. These other possible avenues of escape are: (a) To apply successfully for modification of the decree, as authorized by ¶14 (R. 50); (b) To apply successfully to the court, after November 15, 1942, for vacation of the decree in whole or in part, as authorized by ¶18 (R. 52–53); (c) To obtain a suspension of the requirements of paragraphs 6 and 7 to the extent that the practices prohibited had not been ruled to be illegal in the criminal proceeding, as authorized by ¶12a (R. 48–49); (d) To show to the court that a competitor other than General Motors or Ford had sold 25% as many automobiles as Chrysler, that practices of such competitor, prohibited by the decree, put Chrysler at a competitive disadvantage, and that the United States had not diligently proceeded against such competitor to obtain an adjudication of the illegality of such practices, as authorized by ¶15 (R. 50–51).

[9] Among the obligations assumed upon registration are: (a) Not to accept assignments of, or to garnishee, wages or salaries to collect a deficiency judgment with respect to any noncommercial sale for less than $1,000; (b) Not to take a deficiency judgment with respect to a noncommercial sale where the purchaser has paid 50% of his obligation; (c) Not to collect from any retail purchaser an amount in excess of the actual losses and expenses caused by his failure to pay his obligation; (d) Not to make a higher charge for extending or revising a transaction than the pro-rata equivalent of the original finance charge; (e) Not to charge more than 5% of the delinquent installments for reinstating a delinquent account; (f) Not to take, as additional security, a lien on property other than the automobile purchased (R. 36–37).

for its assumption of these obligations, it receives certain benefits in that the decree permits Chrysler to furnish certain information, services, facilities, or privileges exclusively to registered finance companies (R. 33–34) and permits it to advertise that a retail finance plan approved by it is available through all registered finance companies (R. 41–42).

It is questionable whether the fair and free competition between finance companies which the decree seeks to bring about could be attained with affiliation existing between Chrysler and a particular finance company. In view of the dependence of Chrysler dealers upon the good will of Chrysler,[10] many dealers would, in order to win Chrysler's favor, finance through its affiliate. With affiliation, favored treatment may take many forms and detection is difficult and the suspicions which it would arouse would tend to weaken materially the system of fair dealing and equal opportunity for all contemplated by the registration provisions of the decree.

The allegation in the bill of complaint (R. 8) that each of the three great automobile manufacturers has engaged in a like conspiracy with its respective affiliated finance company, in other words, that there has been a common pattern of

[10] The bill of complaint alleges that the Chrysler dealer contracts are subject to cancellation at the will of Chrysler (R. 5).

behavior where affiliation exists, clearly indicates that the proceeding against appellants is based upon the view that affiliation gives rise to restraints of trade of the kind charged in the bill and prohibited by the consent decree. It is a fair inference, therefore, that termination of the bar against affiliation would seriously threaten the integrity of the decree as a whole.

The district court, in weighing the equities involved in the application for modification, was warranted in determining the objectives of the decree in the light of the allegations of the bill of complaint. Since a consent decree sets forth the relief which the parties have agreed shall be granted with respect to the charges of the bill, the court, when a change in such a decree is proposed, may and should look to these charges to determine the evils which the decree is designed to prevent. *United States* v. *Swift & Co.*, 286 U. S. 106, 115–116. And it makes no difference in this connection that the defendants have filed answers traversing the charges of the bill and that the decree recites that it shall not be considered an adjudication that the defendants have violated any law.[11]

If extending the period of the prohibition against affiliation would have imposed any serious burden upon Chrysler or if the Government had been unduly dilatory in prosecuting the civil pro-

[11] There was such traverse and recital both in the *Swift* case, 286 U. S. 106, 111, and in the present case (R. 29–30).

ceeding against General Motors, the court might have considered either of these circumstances sufficient reason for denying the Government's motion. But the facts before the court below showed no such burden and, as we point out later (*infra*, pp. 25–27), they showed no such undue delay.

At the hearing below appellants in effect conceded that they could not make any showing that a year's extension of the bar against affiliation would prove actually injurious. In general, their position was that they stood upon their assumed legal right not to have any change made in the decree which would in any measure increase their obligations thereunder.

While counsel for Chrysler asserted broadly that it was at a competitive disadvantage when General Motors owned a finance company and Chrysler did not (R. 89–90), the assertion was based solely on the fact that General Motors was participating in the profits of the business of automobile financing whereas Chrysler was barred from participating therein (R. 88).[12] Thus the only burden resulting from extension of the bar against affiliation which was even suggested was that Chrysler would be denied the right, during 1941, to participate in the profits of the business

[12] This fact might affect the respective over-all earnings of the two companies, but it would have no more effect upon competition between them in selling automobiles than would ownership by one, but not by the other, of a company manufacturing electric refrigerators, or airplanes, or any other of a myriad of different products.

of automobile financing.[13] But the injury, if any, resulting from thus temporarily closing this outlet for investment of surplus funds is highly speculative. As to the profitableness of such an investment, it is not only subject to the ordinary hazards of investment in a business enterprise,[14] but to the additional hazard of a proceeding by the Government, if it is successful in its civil proceeding against General Motors, to compel Chrysler to dispose of its finance-company investment (R. 94–95, 96). Moreover, counsel for Chrysler admitted that it had no present plans for acquiring an interest in a finance company (R. 89, 94, 115).

If an actual opportunity to make a favorable investment in a finance company arose during 1941,[15] the court, upon application by Chrysler (pursuant to ¶14) for modification of the extended bar against affiliation, could then reconsider the question of continuance of the bar beyond January

[13] In fact, no other injury could be legitimately suggested since the other prohibitions of the decree cut off, or are intended to cut off, other advantages arising from affiliation.

[14] In 1938, the year in which the decree was entered, the low price of the common stock of Commercial Credit was 23 and the high price was 59⅞ (*Moody's* 1940 Manual of Investments, p. 1581), a fluctuation in value from the low to the high of more than 150%. As to value today, the price range of this stock for the week ended October 4, 1941, was 23⅛–23¾ (N. Y. Times of October 6, 1941, p. 28).

[15] The fact that affiliation was currently enjoined would not bar Chrysler from making plans or arrangements to acquire an interest in a finance company if and when the prohibition terminated or was lifted by an order of this court.

1, 1941, in the light of the showing that such continuance is actually burdensome to Chrysler. The views of the district court in this connection are shown by the following colloquy with counsel for Chrysler (R. 115–116):

> The COURT. And it appears to me if the Chrysler Company is not proposing to go into the finance business they are not being hurt. Mr. Kelley, I can't see where you are being hurt a bit by an extension of the time in this decree.
>
> Mr. KELLEY. Because, if your Honor please, we have a right, as soon as the injunction as provided by this decree comes to an end, then to consider arrangements, and it may be very desirable to do so.
>
> The COURT. All right, consider your arrangements and come to the court and ask for a modification and show that you are being hurt by competition with General Motors or some company, and then it will be time enough for a court of equity to consider extending or curtailing the time. You make no showing now that you will be harmed one penny's worth.

The Chrysler brief (p. 12) quotes an excerpt from *United States* v. *International Harvester Co.*, 274 U. S. 693, 703, which, taken by itself, might indicate that a consent decree is in the nature of a composition between the parties not subject to alteration without their assent. *United States* v. *Swift & Co.*, 286 U. S. 106, definitely holds that a

consent decree does not have this effect. But the Government also urges that even if the decree in the instant case were treated as a composition, the basic composition was that the prohibition against affiliation, like the other prohibitions of the decree, should abide the outcome of the Government's litigation against General Motors (see R. 72, 87–88) and that the purpose of the time limitation of January 1, 1941, was to provide assurance against unreasonable delay in the proceedings against General Motors (see R. 111–112). The Government therefore submits that the order of the district court, while modifying the language of the decree, actually served to carry into effect the basic composition of the parties.

## II

### THE DISTRICT COURT DID NOT ERR IN ACTING UPON THE GOVERNMENT'S MOTION WITHOUT FIRST HEARING TESTIMONY SINCE ALL FACTS RELEVANT TO DETERMINATION OF THE MOTION WERE EITHER UNDISPUTED OR WITHIN THE COURT'S JUDICIAL NOTICE

At the hearing before the district court it developed that there were no relevant, disputed factual issues requiring the taking of proof.

The Government's motion and Chrysler's answer presented an issue as to whether the United States had proceeded with due diligence to require General Motors to divest itself of control of GMAC. Assuming *arguendo* that this issue was relevant, the facts bearing thereon were not in dispute.

The parties were in agreement that the Government's suit to terminate General Motors' affiliation with GMAC was instituted on October 4, 1940 (R. 56, 59) and there was no claim that any further steps had been taken therein prior to the hearing on the motion to modify the consent decree. The grounds set forth in said motion as justifying the Government in failing to bring this suit at an earlier date (R. 56), namely, that final disposition of the criminal proceeding against General Motors would shorten and simplify trial of the civil proceeding and would avoid the unnecessary burden and expense of a retrial of the same issues, raised no issue which required the taking of proof. Conspiracy to restrain interstate commerce in General Motors cars by excluding others than GMAC from the business of financing such cars in interstate commerce, as charged in the criminal proceeding, was the necessary foundation for the stock-divestment proceeding. If the criminal convictions were finally sustained the fact that the defendants had so conspired would be *res adjudicata* in the civil proceeding (*Local 167* v. *United States,* 291 U. S. 293, 294, 295, 298–299), and as a result it would be unnecessary to retry in this proceeding the complicated issues of law and fact relating to conspiracy.

We submit, therefore, that even if it be assumed that laches or undue delay in the civil pro-

ceeding against General Motors would be a ground for denying the motion to modify the consent decree, there were no factual issues relating to the question of laches which required the taking of proof.

The Government's motion alleged and Chrysler's answer denied that the parties, when the decree was entered, underestimated the length of time which would be required to bring such civil proceeding to a conclusion (R. 55, 60). But the court below did not rely upon, and did not regard the Government as relying upon, "mistake", in the sense that the terms of the decree fail to express the meaning which the parties intended (R. 105–106, 112). The Government concedes that the decision below must be supported wholly independently of the allegation that the parties underestimated the time required to terminate the civil proceeding against General Motors.

If the question whether the Government had diligently prosecuted the criminal proceeding against General Motors was relevant in the instant case, the facts bearing upon this question were undisputed. The accuracy of Government counsel's statement of the course of this proceeding (R. 74–76) was not questioned by counsel for Chrysler.[16] The district court was of the opinion

[16] The facts as thus stated were: The defendants filed a demurrer which was overruled by the district judge who heard the present case; he later disqualified himself and an-

from facts within its judicial notice (note 2, p. 6, *supra*) and within its actual knowledge (R. 108, 109–110) that the Government had diligently prosecuted the criminal proceeding (R. 103, 104, 110).

The motion for modification does not raise any question as to the *meaning* of the provisions of the decree relating to affiliation. Insofar as the motion raises a question as to the primary *purpose* of these provisions, such purpose is to be determined from the four corners of the decree, read in the light of the allegations of the bill of complaint upon which the decree is based.

A consent decree is not a contract; it is a judicial act. *United States* v. *Swift & Co.*, 286 U. S. 106, 115. While a consent decree is the product of preliminary agreement between the parties, an essential part of their agreement is that the parties shall invoke and submit to judicial action. They thus consent that the court shall exercise its own independent judgment as to the meaning or purposes of the decree which it enters. In the present case it is unnecessary to decide whether

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other district judge was assigned to the case; the latter reconsidered the demurrer, overruled it and took action on certain preliminary motions filed by defendants; trial of the cause began early in October 1939 and ended on November 17, 1939; the Government actively cooperated with defendants in reducing the record on appeal (which originally comprised several thousand pages both of testimony and exhibits); the case was set for argument on appeal on January 17, 1941.

it would be error to admit testimony concerning the views which the parties entertained concerning purpose at the time when they assented to the decree. The question is whether the district court abused its discretion when it acted upon the Government's motion without having first taken such testimony and whether this abuse of discretion necessitates reversal of its order modifying the consent decree.

The hearing before the district court indicated the futility in the instant case of taking testimony concerning the views of the parties as to purpose. As statements by counsel for Chrysler at the hearing strongly suggest, the purpose which the Government had in mind in acceding to the affiliation provisions was to have the bar against affiliation abide the outcome of its civil proceeding against General Motors (R. 87–88). Accordingly, even if appellants then entertained a different view, namely, that time was of the essence with respect to the date of January 1, 1941, in ¶ 12, there would be no meeting of mind by the parties upon which the court could rely for guidance and it would be required to make its own independent determination as to the primary purpose of the provisions relating to affiliation.

The error which appellants urge is, not that the district court barred them from offering evidence in opposition to the Government's motion, but that it granted the motion without requiring that it be

supported by formal proof (Chrysler brief, pp. 8–13). The Government's position is that the facts necessary to support the requested order of modification were before the district court on the hearing which was held and that it was then shown that these facts were either undisputed or within the court's judicial notice. Under these circumstances, to set the case down for the taking of evidence would be an empty formality.

If, however, this Court should be of the opinion that it was error to grant the motion for modification without having first required the presentation of formal proof, the Government submits that in that event the case should be remanded to the district court with directions to determine the Government's motion after the taking of evidence. Certainly if granting the motion prior to the taking of evidence is error, denying the motion prior thereto would be equally erroneous.

## III

### THERE WAS NO DEFECT OF PLEADING REQUIRING REVERSAL OF THE DISTRICT COURT'S ORDER

The Government by its motion did not seek relief upon the ground that the provision of the decree which it sought to have modified had been entered against it through its "mistake" and the district court did not treat the motion as one seeking relief upon this ground (R. 105–106, 112). Accordingly, Rule 60 (b) of the Rules of Civil

Procedure providing that the court may, on motion, relieve a party "from a judgment, order, or proceeding taken against him through his mistake" and that such motion must be made within six months of the entry of the judgment or order in question has no application.

Chrysler contends (br., pp. 17–18) that the Government, to secure the relief which it sought, was required to proceed by way of supplemental complaint. We submit that a motion was the proper form of proceeding. The Government was applying to the court for an order modifying the decree. Rule 7 (b) of the Rules of Civil Procedure provides: "An application to the court for an order shall be by motion." The Government's motion, moreover, conformed to the requirement of this rule that the motion "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

The only difference in substance between proceeding by motion and proceeding by supplemental complaint is that Rule 15 (d) of the Rules of Civil Procedure provides for securing permission of the court, after notice to the adverse party, before filing a "supplemental pleading". But paragraph 14 of the consent decree authorizes "any of the parties to this decree to make application to the court at any time * * * for the modification" of the decree (R. 50). This provi-

sion expressly authorizing application to the court for modification of the decree rendered it unnecessary to secure the permission of the court before making such application. It was therefore wholly immaterial whether the Government designated its application for modification a motion or a supplemental complaint.

Notice of the hearing on the motion was served on appellants (R. 53, 54) and a written answer was filed by Chrysler (R. 59).

## IV

### THIS COURT SHOULD PASS UPON THE MERITS OF THE APPEAL NOTWITHSTANDING THE DISTRICT COURT'S FAILURE TO MAKE SPECIAL FINDINGS OF FACT

The district court did not make findings of fact or state its conclusions of law. While Rule 52 of the Rules of Civil Procedure provides that in all actions tried upon the facts without a jury the court shall find the facts specially and shall state separately its conclusions of law, failure to comply with such a requirement does not render the trial court's decree void. *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, 591–592. Since the rule is in aid of appellate review, compliance therewith may be waived by the appellate court. In *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55, where this Court refused to pass upon the merits of the appeal because the trial court had failed to comply with the corre-

sponding provisions of Equity Rule 70½, the Court clearly regarded it as discretionary, depending upon the circumstances of the particular case, whether there should be remand because of noncompliance with the rule. This was also the view of the dissenting justices (304 U. S. 55, 58).

The present case will become moot on January 1, 1942. If this Court should refuse to pass upon the merits of the appeal because of noncompliance with Rule 52, the case will become moot before there can be any appellate review of the action taken by the district court. We submit that under these circumstances enforcement of the rule should be waived, particularly since failure to follow the rule has not significantly increased the burden of appellate review. The record is short, there is no conflicting testimony, and the questions presented for review are comparatively simple.

## CONCLUSION

It is respectfully submitted that the decree of the district court should be affirmed.

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